No. 370.

# Supreme Court of the United States,

OCTOBER TERM, 1919.

J. HARTLEY MANNERS,

*Petitioner,*

*against*

OLIVER MOROSCO.

## REPLY BRIEF ON BEHALF OF PETITIONER.

DAVID GERBER,
WILLIAM J. HUGHES,
*Counsel for Petitioner.*

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

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OCTOBER TERM, 1919.

J. HARTLEY MANNERS,
Petitioner,

AGAINST

OLIVER MOROSCO,
Respondent.

No. 370.

## REPLY BRIEF ON BEHALF OF PETITIONER.

### I.

Counsel for Respondent in their brief under Third Point (p. 39), say:

> "The plaintiff's brief asks at page 20: 'If he (the defendant) possessed the motion picture rights, what was there to prevent his producing the play in that form, and not at all as a spoken drama?' The answer is in paragraphs Third, Fifth, Sixth and Eleventh (fols. 43-49). The defendant contracted to give seventy-five 'performances' 'in first-class theatres with a competent company' for six theatrical seasons, and if he failed to give that number then or during any future season, all his rights in the play reverted, except under the conditions which permitted him to release it for stock."

If, as is now for the first time admitted, the license, by reason of these paragraphs, means that the performances mentioned must be given in

spoken drama, where does counsel find, anywhere in the agreement, the right to produce the play in other than first-class theatres or by means of motion pictures?

We have at last the concession—in support of our contention—that the enumerated provisions call for a performance of the play by living actors only. These clauses embrace the rights accorded to respondent and obligations assumed by him respecting the kind of performances authorized by the license. In other words, the contract covers only a "presentation on the stage" as construed in *Klein* v. *Beach*, 239 Fed. Rep. 108.

Again we ask, what clause is there in the license which relates to motion picture exhibitions, distinct from the performances required or authorized under paragraphs third, fifth, sixth and eleventh, referred to by counsel?

> "We should remember that the contract must be so construed as to give meaning to all its provisions, and that that interpretation would be incorrect which would obliterate one portion of the contract in order to enforce another part thereof."
>
> *Burdon Central Sugar Refining Co.* v. *Payne*, 167 U. S. 127-142.

## II.

Referring to paragraph "seventh" of the contract forbidding alterations, eliminations or additions in the play, counsel ask:

> "Would the appellant claim that because of this clause, the defendant could not have presented the play in pantomime by living actors upon the stage or with the aid of a mirror? (Respondent's brief, p. 64)."

Categorically answering, we say that the respondent could *not* under a license prohibiting alterations, eliminations or additions, eliminate the entire dialogue and perform the play as a pantomime or with the aid of a mirror.

Counsel continuing their argument, say:

> "Yet these are the very tests which in the *Kalem* case, 222 U. S. 55, 61, the Supreme Court of the United States laid down for determining whether a motion picture presentation would be an infringement of the copyright of the play."

As we stated in our main brief, this Court in the *Kalem* case had before it an alleged infringement of complainants' copyrighted book and play and held, in effect, that to present a play in pantomimic form or by living actors with the aid of a mirror, called for the dramatization of the book and therefore would violate the author's exclusive right of dramatization.

## III.

Counsel contend that the supplemental contract of July 20th, 1914, illustrates the intention of the parties to transfer to defendant the ownership of the play for all production purposes (Second Point, Respondent's brief, p. 40).

We cannot follow or grasp the argument of the learned counsel in this respect. Petitioner's contention is and always was, that the life of the license was five years or theatrical seasons. The force of this contention is emphasized, if we place a comma following the word "thereafter" found in

the third paragraph of the license. This paragraph would then read as follows:

> "The party of the second part (Morosco) agrees to produce the play not later than January first, 1913 and to continue the said play for at least seventy-five performances during the season 1913-1914 and for each theatrical season thereafter, for a period of five years." (Record p. 108, fol. 323.)

The first season being that of 1913-1914, the end of the five-year period would follow the termination of the theatrical season of 1917-1918. At the time the modification agreement was entered into, the respondent contended and reiterates that contention (Respondent's brief, p. 25), that the season of 1913-1914 should not be included in the computation, for the reason that the word "thereafter" should be construed to mean five theatrical seasons following—not including—the season of 1913-1914. Because of this dispute, paragraph "ninth" of the modification agreement, which prohibited petitioner (as well as defendant) from giving or authorizing a motion picture exhibition, fixed the period as four years from the date of the contract—that is to say down to the end of the season of 1917-1918, leaving open the question whether the respondent, as he then contended and now contends, had any rights under the license "after the expiration of said four-year period".

Respectfully submitted,

DAVID GERBER,
WILLIAM J. HUGHES,
Counsel for Petitioner.